

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

TONYA RENE BOYLE,

Defendant and Appellant.

C058757

(Super. Ct. No. 07F3784)

A jury convicted defendant Tonya Renea Boyle of second degree murder (Pen. Code, §§ 187, 189),¹ found true the allegations that she personally used a dangerous weapon, a knife (§ 12022, subd. (b)), and that the victim was older than age 60 (§ 1203.09, subd. (f)). On appeal, defendant contends that (1) insufficient evidence supports the murder conviction, (2) the prosecutor committed misconduct by misstating the burden of proof; (3) the trial court misinstructed the jury by giving CALCRIM Nos. 3471, 3472, and 3473 regarding the limitations of self-defense; (4) CALCRIM No. 361 [failure of defendant to explain or deny evidence in her testimony] is unconstitutional;

¹ Undesignated statutory references are to the Penal Code.

(5) there was no evidentiary basis for giving CALCRIM No. 361 to inform the jury about the permissible inferences that could be drawn from her failure to explain or deny incriminating evidence; and (6) the cumulative effect of the instructional errors compels reversal.

We reject defendant's contentions of prejudicial error. We shall therefore affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In June 2007, the Shasta County District Attorney filed an information charging defendant with first degree murder. (§ 187, subd. (a).) The information further alleged that defendant used a deadly weapon (a knife) in the commission of the murder (§ 12022, subd. (b)), and that the victim was over age 60 (§ 1203.09, subd. (f)). In response, defendant pled not guilty and denied the enhancement allegations.

Evidence introduced during the jury trial showed that John Bowles was 73 years old at the time of his death on April 9, 2007. Defendant and Bowles had known each other for about 15 years. During that time, Bowles dated defendant's mother. Defendant referred to Bowles as "Papa John" because he was a father figure to her. Bowles and defendant frequently argued about his behavior around defendant's mother, his unwanted sexual advances toward defendant, her addiction to methamphetamine, and a life insurance policy carried by Bowles.

Bowles lived in a trailer at the Bear Mountain Road RV Park in Jones Valley, California. Defendant lived in Shasta Lake City, which is about a 10-minute drive away.

On April 8, 2007, defendant and Bowles attended a barbecue at the home of his neighbor, Steven Cantrell. Defendant's then 18-year-old son, Jeremie Faria, also attended. Everyone at the barbecue was drinking beer. After 5:00 p.m., those attending started smoking marijuana and ingesting hallucinogenic mushrooms.

At the barbecue, defendant and Bowles argued vociferously about his life insurance policy. Around 7:00 p.m., Faria wanted to leave because his mother was disrupting the party. Defendant refused and said, "We got to hang with [Bowles] because when he dies, I get 96 thousand dollars." Bowles had previously told defendant that she was the beneficiary of his life insurance policy. However, Bowles had recently announced his plan to change the beneficiary to Cantrell's three-year-old daughter in the following week.

At 8:00 p.m., Bowles left the barbecue. Defendant stayed and helped herself to some of the hallucinogenic mushrooms. She also offered some to her son. Cantrell was incensed by defendant's greedy behavior with the mushrooms and ordered her to leave. Defendant and Faria left around 8:30 p.m. Bowles gave them a ride home.

Defendant's friend, Scott Higgins, was at her home when they arrived. Higgins and Bowles had a brief scuffle in which Bowles attempted to throw a punch. Despite their squabble, Bowles helped jumpstart Higgins's truck. Bowles also briefly argued with defendant before he drove off.

Later that evening, Bowles telephoned defendant's home. Faria answered the phone but refused to allow Bowles to speak with defendant. Bowles told Faria, "Oh, later on, you and your mom are going to go to bed and you're going to go to bed with [Higgins], too, and have sex." Faria was shocked and upset at the comment. Faria told his mother, who also became upset.

An hour or two later, Higgins agreed to drive defendant to Bowles's trailer park. Defendant told Faria that she was going to confront Bowles about the rude telephone call. Defendant intended to tell Bowles that he should leave her alone if he could not behave himself.

Higgins, testifying under a grant of immunity, explained that defendant called him shortly before midnight to ask for a ride to Bowles's home. Defendant said that "Papa John is saying shit." Higgins drove defendant to the entrance of Bowles's trailer park. Defendant got out and walked the rest of the way.

About 15 minutes later, defendant returned and told Higgins, "Let's get out of here." While they were driving back to her home, defendant said, "I really think I did it this time." She told Higgins that she stuck Bowles in the stomach and neck with a knife. When Higgins asked what she had done with the knife, she answered that she washed the knife in the sink before leaving. She also said she "had to cut him."

When defendant returned home, her son noticed a cut on the bridge of her nose. Before defendant got into the shower, she asked Higgins to check whether she had any marks or bruises on her body. Higgins saw none.

On the morning of April 9, 2007, defendant instructed Higgins and Faria not to tell the police that she and Higgins had been to Bowles's trailer park.

The same morning, a neighbor went to check on Bowles and found him dead in his trailer. Bowles was lying face down on the floor next to a bloody knife. Blood stains were scattered throughout the kitchen. Sheriff's deputies found a bloody handprint on the inside of the trailer door. A fingerprint expert testified that the handprint matched defendant's left palm, and it appeared the blood was on her hand before she touched the door.

A forensic pathologist testified that an autopsy of Bowles revealed multiple knife wounds, including a six-inch-deep wound perforating his heart. A five-inch-long cut on Bowles's throat also caused extensive bleeding. Bowles had numerous cuts on his face that matched the unusual pattern of serrated teeth on the knife found in his kitchen. Bowles also had a shallow cut on his right index finger, which was consistent with a defensive injury. The pathologist concluded that Bowles died as a result of blood loss. The watch that Bowles was wearing when he died had several strands of defendant's hair caught in it.

Defendant denied any involvement in Bowles death when she was initially interviewed by sheriff's detectives on April 9. She claimed to have last seen Bowles when he gave her a ride home from the barbecue.

Defendant was interviewed again by the detectives on May 2, 2007. Although defendant initially reiterated her denial of

involvement in Bowles's death, she confessed to stabbing him after being told that her bloody palm print had been found at the scene. At the request of the detectives, defendant demonstrated how she stabbed Bowles in the chest and neck. Defendant was arrested after the interview.

Two days after her arrest, defendant's family visited her in jail. During the visit, defendant explained to her ex-husband "that the reason she did it is because . . . Johnny Bowles was fucking really -- fucking with [Faria] real bad"

At trial, defendant testified on her own behalf. She explained that she was very sad on April 8, 2007, because she had just learned her mother was terminally ill. She spent the day drinking beer with Bowles and crying about the news of her mother's condition. Over the course of the day, she consumed seven to nine beers.

Sometime during the day, Bowles grabbed defendant's breast. He stopped when she swore at him and told him to stop.

Around 5:00 or 6:00 p.m., defendant and Faria went with Bowles to his neighbor's barbecue. Defendant drank beer and consumed hallucinogenic mushrooms. The mushrooms upset her stomach and made her feel very agitated.

Defendant and Bowles argued because he wanted to be alone with her. When Bowles went home, she followed him into his trailer where he groped her again. After defendant began to cry, Bowles drove her and her son home.

Bowles became angry when he saw Higgins at defendant's home. Out of jealousy, Bowles told Higgins to "[g]et the fuck out of here." To get Higgins to leave, Bowles helped jumpstart his car. The two men drove away at the same time.

Defendant went to a friend's house and returned home around 10:00 to 10:30 p.m. Sometime later, Faria answered Bowles's phone call. After hanging up, Faria began to cry and told defendant that Bowles had accused him of having sex with defendant and Higgins. Defendant attempted to call Bowles back but was unable to reach him. She planned to "take care of it" the next day.

Defendant continued to feel upset and agitated. An hour later, she decided to go to Bowles's home to confront him and to get some marijuana to calm her down. She received marijuana from Bowles "[a]ll the time." Higgins agreed to drive defendant to Bowles's trailer park.

When defendant entered Bowles's trailer, he was sitting on his bed and appeared intoxicated. Defendant told Bowles she was upset because of her mother's prognosis. Bowles asked how she had gotten to his trailer. Defendant replied that she had walked, but Bowles did not believe her. Bowles asked her if Higgins brought her and then "all hell broke loose." Defendant had never seen Bowles so angry.

Bowles grabbed her hair and started pulling her sweatshirt and shirt over her head. Bowles said, "If you're going to be fucking him, you're going to be fucking me." Bowles tried to pull her down onto him. Defendant told him to let go but he

refused to release her. She reached behind her "for anything and just started swinging." She grabbed onto something with a handle and swung at Bowles in a figure-eight motion.

Bowles pushed her away and said, "Tonya, what did you do?" While defendant fixed her clothing, Bowles said, "Go on; get the hell out of here." Defendant asked what was wrong, and Bowles told her, "You better fucking run" Defendant did not see any blood. Fearing that he would attack her, defendant fled. As she looked back, defendant saw Bowles trying to stand up from his seated position.

After the close of evidence, the prosecutor elected not to seek a conviction for first degree murder. The jury convicted defendant of second degree murder and found the special allegations to be true.

The trial court sentenced defendant to 16 years to life in prison. Defendant timely filed a notice of appeal.

DISCUSSION

I

Sufficiency of the Evidence

Defendant contends insufficient evidence supports her murder conviction because there was no evidence of motive to kill. Defendant also asserts that Bowles's stab wounds were as consistent with self-defense as they were with an intent to kill. We are unpersuaded.

A

For claims of insufficient evidence, the California Supreme Court has explained, "The law is clear and well settled. 'On

appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320, 61 L.Ed.2d 560.) The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.) 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]' (*Id.* at pp. 932-933.)" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

B

Motive is not an element of murder. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 218; *People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) Thus, even if the record failed to show a motive for defendant's stabbing of Bowles, lack of motive would not render the evidence in support of her murder conviction insufficient. (*Ibid.*)

Here, the record does indicate a motive to kill. In asserting that defendant lacked a motive to kill Bowles, she fails to acknowledge the testimony about his life insurance policy. As Bowles's neighbor testified, defendant appeared determined to put up with Bowles's rude behavior because of the possibility of receiving the \$96,000 for which he was insured. The argument between defendant and Bowles at the barbecue a few hours before his death focused on his life insurance policy. Defendant's entitlement to the proceeds was threatened by Bowles's plan to make his neighbor's daughter the beneficiary sometime during the next week. This evidence showed that defendant would benefit from Bowles's death before he had a chance to switch beneficiaries.

Moreover, defendant's own testimony established that she was angry enough with Bowles to ask for a late-night ride to his home in order to confront him. Defendant further explained that she planned to no longer have him be part of her life if he was unable to control his rude behavior.

Regardless of motive, the evidence adduced at defendant's trial amply sufficed to establish that she acted with malice when she stabbed Bowles. The nature of Bowles's stab wounds strongly indicated either express intent to kill or, at least, to commit an act that was dangerous to human life.

The chest wound was a deep cut that entered Bowles's heart. The multiple stabs and cuts inflicted on Bowles were not consistent with rapid and frantic motions. Instead, the wounds required defendant to switch the position of the knife in her

hands. Defendant could not have caused Bowles's injuries by swinging wildly at Bowles. The nature of the wounds allowed the jury to reasonably conclude that she deliberately stabbed at Bowles's most vulnerable areas: his head, neck and chest. The numerous cuts he received suggested that defendant engaged in a prolonged attack.

Defendant demonstrated a consciousness of guilt when she later told her ex-husband that "[w]hat I did was because he was fucking with [Faria] real bad." She also instructed her son and Higgins to lie to police in order to deny that she had been back to Bowles's trailer on the night of his death. Defendant lied during her first interview with the police in an attempt to convince them that she was at home when Bowles was stabbed.

Defendant's anger at Bowles and her impending loss of beneficiary status under his life insurance gave her a motive. She admitted that she was at Bowles's trailer and swung repeatedly at him with what turned out to be a knife. Her testimony about a frantic figure-eight swinging motion was refuted by the evidence that she stabbed Bowles into his heart while standing in front of him. The evidence suffices for a second degree murder conviction.

II

Prosecutorial Misconduct

Buried in her argument regarding sufficiency of the evidence, defendant makes the claim that the prosecutor committed misconduct in misstating the burden of proof. An argument must be presented under a separate heading clearly

defining the issue in order to be properly presented on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Moreover, an argument regarding prosecutorial misconduct cannot be raised for the first time on appeal when the defendant failed to object in the trial court. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 822.) In this case, defendant's trial counsel failed to object to the prosecutor's closing arguments. As a consequence, the issue has been forfeited for review both in the trial court and in this court. (*Ibid.*; *People v. McElroy* (2005) 126 Cal.App.4th 874, 884, fn. 3.)

Even if the argument were cognizable, we would affirm nonetheless. The trial court properly instructed the jury on reasonable doubt and to disregard any arguments of counsel conflicting with the law as set forth in the instructions. We presume that the jury properly followed the court's instructions. (*People v. Avila* (2006) 38 Cal.4th 491, 574.) Thus, we are compelled to conclude that the jury understood the prosecution's burden of proof.

III

CALCRIM Nos. 3471, 3472, and 3473

The trial court instructed the jury pursuant to CALCRIM No. 3471, as follows: "A person who is the first one to use physical force has a right to self-defense only if she actually and in good faith tries to stop the fighting, and, two, she indicates by word or conduct to her opponent in a way that a reasonable person would understand that she wants to stop

fighting and that she has stopped fighting. If a person meets these requirements, she then has a right to self-defense if the opponent continues to fight.”²

The court also instructed the jury with CALCRIM No. 3472, as follows: “A person does not have the right to self-defense if she or he provokes a fight or quarrel with the intent to create an excuse to use force.” And, the court gave CALCRIM No. 3473, as follows: “The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends.”

Defendant contends the trial court erred in giving CALCRIM Nos. 3471 and 3472. However, in quoting the challenged instructions, she includes the language of CALCRIM 3473. Because her quotation and analysis include CALCRIM No. 3473, we also include it in our consideration of whether the jury was misinstructed on the limitations on self-defense.

Defendant argues the trial court erred in giving these instructions because “there was no evidence that [defendant] went to Bowles’ trailer to [sic] intending to provoke a fight to excuse her from using physical force or that she was the initial aggressor.” Defendant does not contend CALCRIM Nos. 3471, 3472,

² The trial court omitted the optional last paragraph of the standard CALCRIM No. 3471 instruction, which instructs on mutual combat. The court and counsel agreed that there was no evidence of mutual combat presented at trial.

and 3473 wrongly define the legal constraints on self-defense. Instead, she argues only that insufficient evidence supported the inference that she was the initial aggressor in the fight with Bowles. Thus, defendant asks us to reverse based on insufficient evidence to warrant the giving of CALCRIM Nos. 3471, 3472, and 3473. We reject her arguments.

A

A party is entitled to have a requested jury instruction given by the trial court if supported by substantial evidence. (*Mathews v. United States* (1988) 485 U.S. 58, 63 [108 S.Ct. 883, 99 L.Ed.2d 54].) "Substantial evidence is 'evidence sufficient "to deserve consideration by the jury," not "whenever any evidence is presented, no matter how weak."' " (*People v. Lewis* (2001) 26 Cal.4th 334, 369, quoting *People v. Williams* (1992) 4 Cal.4th 354, 361.) When an instruction is not supported by substantial evidence, the trial court must refuse to give it. "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Here, sufficient evidence was presented at trial to allow a reasonable jury to conclude that defendant was the initial aggressor in an altercation with Bowles. Defendant admitted she had gotten into a fist fight with Bowles about a year before his death. She testified they had been evenly matched in exchanging blows before a neighbor stopped the fight. Defendant therefore knew that she was able to hold her own in a physical confrontation with Bowles.

On the night of the murder, defendant went to Bowles's home in a state of anger and agitation. Although she had earlier resolved to chastise Bowles the next day, she nonetheless ventured out late at night to confront him. In doing so, she ignored her son's advice to wait until the next day. Instead, she testified that she intended to get some marijuana from Bowles and "to also tell him to knock it off." On the way to Bowles's home, defendant told Higgins that "Papa John was saying shit." Defendant was quite angry at the time.

The jury could reasonably conclude that defendant went to Bowles's house to physically confront him on the night that he said things that were "out of bounds" and "broke [her] heart" The trial court did not err in instructing on the limits of self-defense where the evidence showed that defendant wanted to confront Bowles in the middle of the night and she testified that she acted in self-defense. The trial court did not err in giving CALCRIM Nos. 3471, 3472, and 3473.

B

Even if the instructions had been erroneously given, we would be compelled to affirm the judgment. Erroneously given instructions correctly stating the law but which are inapplicable to the facts of a case are reviewed under the *Watson* test for error. (*People v. Guiton, supra*, 4 Cal.4th at p. 1129; *People v. Watson* (1956) 46 Cal.2d 818, 835.) "Under *Watson*, reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*People v. Guiton, supra*, at p. 1130.)

The challenged instructions applied only if the jury concluded that the evidence established defendant was the initial aggressor. If defendant were correct that the evidence failed to prove she started the fight with Bowles, the jury would have had no occasion to rely on CALCRIM Nos. 3471, 3472, or 3473. Thus, the error of which defendant complains would have been alleviated by the jury's conclusion that no evidence made those instructions relevant. As the California Supreme Court has noted, "The jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion. The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.'" (*People v. Guiton, supra*, 4 Cal.4th at p. 1131, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59, [116 L.Ed.2d 371].)

The jury had a factually adequate theory, which did not involve self-defense by defendant, upon which to base the murder conviction. As we explained in part IB., *ante*, the stab wounds inflicted by defendant indicated a deliberate and prolonged attack on Bowles's vulnerable head, neck, and chest. The stabbing was not the result of a single, wild motion by defendant. Combined with defendant's admission of anger at Bowles and her explanation for the attack to her ex-husband, the jury had sufficient evidence to conclude she acted with malice in fatally stabbing Bowles. The erroneous giving of CALCRIM Nos. 3471, 3472, and 3473 on the limitations of self-defense

would not have resulted in an outcome more favorable to defendant.

IV

CALCRIM No. 361 is Constitutional

At the prosecution's request, the trial court instructed the jury pursuant to CALCRIM No. 361, as follows: "If the defendant failed in her testimony to explain or deny evidence against her and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

Defendant challenges the constitutionality of CALCRIM No. 361. She also asserts that, if the instruction passes constitutional muster, CALCRIM No. 361 should not have been given because she did not have the knowledge to explain the pathologist's conclusions regarding the nature of Bowles's stab wounds. She also claims that her failure to see any blood at the scene is conclusively explained by the fact that it was too dark to see anything. We reject her arguments.

A

Defendant challenges the constitutional validity of CALCRIM No. 361 by arguing that "if the defendant does not have the knowledge to deny or explain evidence against her, it is

unreasonable to draw an inference unfavorable to her because of the failure to deny or explain this evidence."

This argument is slightly different from the argument advanced by the defendant in *People v. Rodriguez* (2009) 170 Cal.App.4th 1062 (rev. den.), which found no constitutional infirmity in CALCRIM NO. 361. (*Id.* at p. 1068.)

However, the California Supreme Court rejected a claim nearly identical to defendant's in *People v. Saddler* (1979) 24 Cal.3d 671, 679 (*Saddler*). In *Saddler*, the California Supreme Court considered an argument that CALJIC No. 2.62 (the predecessor of CALCRIM No. 361) was unconstitutional. In relevant part, the former pattern instruction stated: "If you find that [defendant] failed to explain or deny any evidence or facts against him which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of

the crime and the guilt of the defendant beyond a reasonable doubt." (*Id.* at pp. 677-678, fn. 4.)

The defendant in *Saddler* argued that the quoted language "denies to a defendant the presumption of innocence and places in its stead an 'inference of guilt.'" (*Saddler, supra*, 24 Cal.3d at p. 679.) The California Supreme Court rejected the argument that the instruction violated due process. The high court explained that CALJIC No. 2.62, "cautions that 'The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of defendant beyond a reasonable doubt.'" (*Id.* at p. 680.)

The California Supreme Court further explained that the jury instruction passed constitutional muster because it did not impose any presumption of guilt. (*Saddler, supra*, 24 Cal.3d at p. 680.) Neither did the instruction allow any adverse inference to be drawn if the defendant did not have the knowledge necessary to deny or explain evidence against him. (*Ibid.*) As a consequence, CALJIC No. 2.62 did not lessen the prosecution's burden of proof or undermine the defendant's constitutional rights to due process.

The reasons articulated in *Saddler* for CALJIC No. 2.62's constitutional validity apply equally to defendant's challenge to CALCRIM No. 361 in this case. CALCRIM No. 361 allows for only those inferences that can be drawn from the evidence

presented at trial. Moreover, the instruction disallows inferences adverse to the defendant when he or she does not have the knowledge to explain or deny incriminating evidence. In short, CALCRIM No. 361 does not lighten the prosecution's burden of proof or violate a defendant's right to due process.

Defendant's argument to the contrary relies on inapposite case law involving mandatory and permissive presumptions of guilt. CALCRIM No. 361 does not supply a mandatory, or even permissive, presumption of guilt. Thus, CALCRIM No. 361 is fundamentally different than the mandatory presumption in the jury instruction challenged in *Leary v. United States* (1969) 395 U.S. 6 [23 L.Ed.2d 57].) The defendant in *Leary* was convicted of drug trafficking after the jury was instructed that mere possession of marijuana gave rise to the presumption of "knowledge that it had been illegally imported or brought" into the United States. (*Id.* at p. 11.) The United States Supreme Court concluded that the mandatory presumption violated due process. By contrast, CALCRIM No. 361 incorporates no mandatory presumption.

Also inapplicable is the case of *County Court of Ulster County v. Allen* (1979) 442 U.S. 140 [60 L.Ed.2d 777] (*Ulster*).) In *Ulster*, the United States Supreme Court held that permissive presumptions of guilt comport with due process so long as they allow the jury to take into account the actual evidence at trial. The Supreme Court upheld an instruction setting forth the permissive presumption that the presence of an unlawful firearm in a vehicle was possessed by each occupant because the

jury was free to disregard the presumption even in the absence of rebuttal evidence. (*Id.* at pp. 161-162.) As the *Ulster* court noted, the permissive presumption did not deny the jury the prerogative to make an independent evaluation of the facts. (*Id.* at p. 161.) Because CALCRIM No. 361 does not require the jury to draw any particular adverse inference from a defendant's failure to deny or explain evidence, the instruction does not violate due process.

In *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034 (*Hanna*), the Ninth Circuit struck down an instruction allowing the jury to find that driving in excess of a lawful speed by itself warranted a finding of recklessness. (*Id.* at p. 1038.) The *Hanna* court explained that the permissive inference could not be supported by the mere fact of speeding because "speeding alone, cannot support a conviction for vehicular manslaughter and vehicular assault. To be convicted of these crimes, the government must prove beyond a reasonable doubt that Hanna drove in a reckless manner" (*Id.* at p. 1038.) Even while striking down the instruction in that case, the *Hanna* court noted: "Permissive inference jury instructions are constitutional, however, 'so long as it can be said 'with substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.''" (*Id.* at p. 1037.) In *Hanna*, the instruction "invited" the jury to convict the defendant even if he was going only slightly faster than allowed by the speed limit. (*Id.* at p. 1038)

CALCRIM No. 361 does not run afoul of the dangers lurking in permissive presumptions because the instruction does not tell the jury what sort of inferences to draw from the evidence. Instead, the instruction leaves the work of determining what conclusions may be inferred from the evidence to the jury. As such, the instruction does not lighten the burden of proof on the prosecutor. Nor does CALCRIM No. 361 deny a defendant the right to due process of law. (*People v. Rodriguez, supra*, 170 Cal.App.4th at p. 1067.)

V

There was an Evidentiary Basis for Giving CALCRIM No. 361

Defendant next contends that CALCRIM No. 361 should not have been given because there was no incriminating evidence of which she had the knowledge to deny or explain in a noninculpatory way. We disagree.

In *People v. Mask* (1986) 188 Cal.App.3d 450 (*Mask*), this court noted that the evidence adduced at trial determines whether CALJIC No. 2.62 should be given. Although *Mask* involved the predecessor to CALCRIM No. 361, the same principles apply to both instructions regarding inferences that a jury may permissibly draw. In *Mask*, we explained that "if the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury." (*Mask, supra*, 188 Cal.App.3d at p. 455.)

Consistent with *Mask*, the prosecutor in this case argued that the jury could consider the incriminating implications of defendant's failure to explain key differences between her explanation of Bowles's stabbing and the evidence gathered by the police and forensic pathologist. To this end, the prosecutor asked the jury to consider: "How she could have caused the injuries that have been testified to by [the forensic pathologist], how she could have left the blood-soaked palm print on the door without having gotten his blood on her, how she could have inflicted those wounds in the manner she testified to with the knife in her left hand, how she could have caused those wounds when he was sitting down, why she didn't explain on her initial interview that this was self-defense when given the opportunity, why she didn't do it the second time when given an opportunity."

Defendant denies that she had the knowledge to answer any of these questions raised by the prosecutor. However, the evidence at trial -- often in the form of defendant's own testimony -- established that she should have been able to offer an explanation of issues raised by the prosecutor. Defendant testified that she swung what turned out to be a knife in a figure-eight pattern. Her testimony failed to explain how Bowles received a six-inch stab wound that went into his heart. It also failed to account for the pathologist's conclusion that the angles and orientations of the wounds required switching positions of the knife in her hand. Moreover, the very numerosity of cuts and abrasions Bowles received indicated a

prolonged attack at odds with her explanation of a single swinging motion with the knife. Defendant's testimony that Bowles was seated during the entire encounter failed to explain the upward angle of the stab wound to Bowles's cheek.

Defendant's claim that she did not see any blood on Bowles or in the trailer was highly implausible. The police found blood throughout the kitchen in Bowles's trailer. In arguing that "it was dark" when she left the bloody print, she forgets her testimony that she was able to see Bowles smile when she first entered the trailer. The bloody print on the door of the trailer meant that defendant had blood on her even after she left.

Defendant's failure to explain this adverse evidence allowed the jury to draw inferences on the issues raised by the prosecutor. Defendant stabbed Bowles, and she recalls how the events surrounding his death unfolded. There was sufficient evidence that rendered defendant's testimony implausible, at least as to her failure to see any blood or how she could have caused Bowles's deep chest wound, so that CALCRIM No. 361 was properly given.

VI

Cumulative Prejudice

Defendant contends that the cumulative effect of the instructional errors she raises requires reversal of her conviction. Having rejected each of her claims of error, no prejudice exists. (*People v. Jablonski* (2006) 37 Cal.4th 774, 832.)

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.